

Todd

Thanks for the word version. I have made some edits in red line on it. Here are a few overall thoughts.

1. Suppose an agency goes through notice and comment rulemaking that satisfies section 553 and what arrives is a rule that interprets a term in the statute, such as employee. In some sense, it is plainly an interpretive rule, but it is also a substantive rule that creates rights etc. I suggest a footnote that excludes from this recommendation rules that follow 553 and interpret the words in a statute or regulation.

2. Recommendations 12-15 discuss a subject that is not mentioned in the preamble, yet seems to be broad enough to warrant a separate section within this overall recommendation. In addition, I notice that it addresses topics in the prior recommendations and often in greater detail. The more that I thought about these, the less sure I was that a "rule" that suggests a number of options is what I would think of as a rule, even an interpretive rule, but more closely resembles a policy statement. My reaction is the preamble should describe this form of guidance (see 12, as amended) and then say that even if called interpretive rules, they should be seen as policy statements and handled accordingly. In this connection, I found much of the extra discussion in 13-15 to be unnecessary (too detailed), but if it is necessary, then it is not clear why it does not belong in the earlier recommendations that relate to the same topics..

Hope these are helpful. I am around for another hour and then for much of tomorrow if anyone wants to discuss. I am sending this only to you, but this should go to the committee etc and of course are public.

Alan



## Agency Guidance Through Interpretive Rules

### Committee on Judicial Review

Proposed Recommendation for Committee | April 18, 2019

#### MORRISON SUGGESTIONS

1 The Administrative Procedure Act (APA) exempts policy statements and interpretive<sup>1</sup>  
2 rules from its requirements for the issuance of legislative rules, including notice and comment.<sup>2</sup>  
3 The Attorney General’s Manual on the Administrative Procedure Act defines interpretive rules  
4 as “rules or statements issued by an agency to advise the public of the agency’s construction of  
5 the statutes and rules which it administers.”<sup>3</sup> Because of the commonalities between policy  
6 statements and interpretive rules, including their advisory function, more recently many scholars  
7 and government agencies have adopted the umbrella term “guidance” to refer to both interpretive  
8 rules and policy statements.<sup>4</sup>

**Commented [ABM1]:** Deleted phrase too indefinite because of intervening sentence.

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9 The Administrative Conference has issued several recommendations on policy  
10 statements.<sup>5</sup> The latest one, Recommendation 2017-5, *Agency Guidance Through Policy*

<sup>1</sup> In accordance with standard parlance, this Recommendation uses the term “interpretive” in place of the APA’s word “interpretative.”

<sup>2</sup> 5 U.S.C. § 553(b)(A).

<sup>3</sup> ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947). The Manual defines “statements of policy” as agency statements of general applicability “issued . . . to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”

<sup>4</sup> See, e.g., Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective* (Oct. 12, 2017) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf>.

<sup>5</sup> See, e.g., Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 92-2, *Agency Policy Statements*, 57 Fed. Reg. 30,103 (July 8, 1992); Admin. Conf. of the U.S., Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 41 Fed. Reg. 56,769 (Dec. 30, 1976).



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12 *Statements*, offers best practices to agencies regarding policy statements. The Recommendation  
13 advises agencies not to treat policy statements as binding on the public and to take steps to make  
14 clear to the public that policy statements are non-binding. It also suggests measures agencies  
15 could take to allow the public to propose alternative approaches to those contained in a policy  
16 statement and offers suggestions on how agencies can involve the public in adopting and  
17 modifying policy statements.

18 During the discussion of Recommendation 2017-5, the Assembly considered whether to  
19 extend the recommendations therein to interpretive rules. The Assembly decided against doing  
20 so, but it expressed its views that a follow-on study addressing interpretive rules would be  
21 valuable.

22 This project takes up that charge. Policy statements and interpretive rules are similar in  
23 that they lack the force of law<sup>6</sup> and are often issued without notice-and-comment proceedings, as  
24 the APA permits. This similarity suggests that, as a matter of best practice, when interested  
25 persons disagree with the views expressed in an interpretive rule, the agency should allow them a  
26 fair opportunity to try to persuade the agency to revise or reconsider its interpretation. That is the  
27 practice that Recommendation 2017-5 already prescribes in the case of policy statements.<sup>7</sup> The  
28 benefits to the public of according such treatment, as well as the potential costs to agencies of  
29 according it, are largely the same regardless of whether a given guidance document is concerned  
30 with law, policy, or a combination of both.<sup>8</sup>

31 Recommendation 2017-5 provided that “[a]n agency should not use a policy statement to  
32 create a standard binding on the public, that is, as a standard with which noncompliance may  
33 form an independent basis for action in matters that determine the rights and obligations of any

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<sup>6</sup> *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1208 (2015) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979), and referencing the Attorney General’s Manual on the Administrative Procedure Act, at 30 n.3).

<sup>7</sup> Recommendation 2017-5, *supra* note 5, ¶ 2; *see also* Recommendation 92-2, *supra* note 5, ¶ II.B.

<sup>8</sup> *See* Blake Emerson and Ronald M. Levin, *Agency Guidance Through Interpretive Rules: Research and Analysis* 31–32 (Mar. 8, 2019) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/draft-report-agency-guidance-through-interpretive-rules>.



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34 member of the public.”<sup>9</sup> Although the same basic idea should apply to interpretive rules, the  
35 concept of “binding” effect can give rise to misunderstanding in the context of those rules, for  
36 several reasons.

37 [First, interpretive rules often use mandatory language when the agency is using that  
38 language to describe an existing statutory or regulatory requirement. Recommendation 2017-5  
39 itself recognized the legitimacy of such phrasing.<sup>10</sup> Although the presence of such mandatory  
40 language does not negate the benefits of allowing interested persons a fair opportunity to seek  
41 reconsideration or revision of the particular interpretation the agency chose, it can, as a practical  
42 matter, complicate admonitions that an agency should refrain from characterizing the rule as  
43 “binding.”]

44 Second, discussions of the circumstances in which guidance may or may not be “binding”  
45 bring to mind assumptions that stem from the case law construing the rulemaking exemptions in  
46 the APA. Under that case law, it is universally understood that policy statements may not be  
47 legally binding, but courts and commentators have disagreed about whether the same is true of  
48 interpretive rules.<sup>11</sup> Because of this ambiguity, agency counsel sometimes assume that an  
49 interpretive rule can be binding (although research for this project and for Recommendation  
50 2017-5 disclosed little evidence that many of them act upon that belief<sup>12</sup>). In this  
51 Recommendation the Administrative Conference addresses only best practices and expresses no  
52 opinions about how the APA rulemaking exemption should be construed. Nevertheless,  
53 assumptions derived from the APA background can divert attention from issues of what sound  
54 principles of administration require, which this Recommendation does address.

Commented [TR2]: We would like to hear the Committee’s thoughts on whether this paragraph should remain.

Commented [ABM3R2]: I would leave it in as useful background info.

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<sup>9</sup> Recommendation 2017-5, *supra* note 5, ¶ 1.

<sup>10</sup> Recommendation 2017-5, *supra* note 5, ¶ 5; *accord*, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES, 72 Fed. Reg. 3,436, 3,440 (Jan. 25, 2007).

<sup>11</sup> Emerson & Levin, *supra* note 8, at 19–21; Parrillo, *supra* note 4, at 23–25; *see generally* Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 317–19, 346–53 (2018).

<sup>12</sup> Emerson & Levin, *supra* note 8, at 15–17; Parrillo, *supra* note 4, at 23–24n.36.



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56 Third, administrative lawyers currently differ on the question of whether interpretive  
57 rules are effectively rendered “binding” when they are reviewed in court under the *Auer v.*  
58 *Robbins*<sup>13</sup> standard of review, which provides that an agency’s interpretation of its own  
59 regulation becomes of “controlling weight” if it is not “plainly erroneous or inconsistent with the  
60 regulation.”<sup>14</sup> The question of whether interested persons should be able to ask an agency to  
61 reconsider or revise an interpretive rule does not intrinsically have to turn on what level of  
62 deference the courts would later accord to the agency’s interpretation in the event of judicial  
63 review. Indeed, the possibility of judicial deference at the appellate level (under *Auer* or any  
64 other standard of review) may augment the challenger’s interest in raising this issue at the  
65 agency level.<sup>15</sup> Even so, the doctrinal debate over whether an interpretive rule is or is not  
66 “binding” under *Auer* can have the effect of directing the focus of attention away from these  
67 practical considerations.

68 For the foregoing reasons, the Administrative Conference has phrased the initial  
69 operative provisions of the Recommendation so that it no longer uses the term “binding on the  
70 public.” Instead it urges that agencies not treat interpretive rules as setting independent standards  
71 for action and that interested persons should have a fair opportunity to seek revision or  
72 reconsideration of an interpretive rule. In substance, this formulation expresses positions that  
73 largely correspond with prescriptions that Recommendation 2017-5 made regarding policy  
74 statements, but it does so without implicating unintended associations that the word “binding”  
75 might otherwise evoke.

<sup>13</sup> 519 U.S. 452 (1997).

<sup>14</sup> *Id.* at 461; compare *Perez*, 135 S. Ct. at 1211–12 (Scalia, J., concurring in the judgment) (stating that, because of “judge-made doctrines of deference . . . [a]gencies may now use [interpretive] rules not just to advise the public, but also to bind them”), with *Perez* at 1208 n.4 (opinion of the Court) (“Even in cases where an agency’s interpretation receives *Auer* deference, however, it is the court that ultimately decides whether a given regulation means what the agency says.”). The Supreme Court is currently considering whether to overrule *Auer* in *Kisor v. Wilkie*, 139 S. Ct. 657 (2018) (granting certiorari). For reasons explained in the text, the present recommendations do not depend on which view of *Auer* one favors, nor on what the Court may decide in *Kisor*.

<sup>15</sup> See Emerson & Levin, *supra* note 8, at 23.

**Commented [ABM5]:** Given this context, “substantive” is more likely to be confusing than helpful.

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77 What constitutes a fair opportunity to contest an interpretive rule will depend on the
78 circumstances. Research conducted for Recommendation 2017-5 indicated that a variety of
79 factors can deter affected persons from contesting guidance documents with which they disagree;
80 these factors operate in approximately the same manner regardless of whether a policy statement
81 or interpretive rule is involved.<sup>16</sup> Agencies that design procedures for requesting reconsideration
82 or modification of both types of guidance should be attentive to circumstances that affect the
83 practical ability of members of the public to avail themselves of the opportunity to be heard. At
84 the same time, agencies should also consider governmental interests such as the agency’s
85 resource constraints and need for centralization.<sup>17</sup> For example, Recommendation 3 recognizes
86 that the need for coordination of multiple decisionmakers in a given program may justify
87 requiring lower level employees to adhere to the agency’s interpretive rules.

RECOMMENDATION

Recommendations Applicable to All Interpretive Rules

- 88 1. An agency should not use an interpretive rule to create a standard where noncompliance
89 may form an independent basis for action in matters that determine the rights and
90 obligations of any member of the public.
91 2. An agency should afford members of the public a fair opportunity to argue for
92 modification, rescission, or waiver of an interpretive rule.
93 3. It is sometimes appropriate for an agency, as an internal agency management matter, and
94 particularly when an interpretive rule is used in connection with regulatory enforcement,
95 to direct some of its employees to act in conformity with an interpretive rule. But the
96 agency should ensure that this does not interfere with the fair opportunity called for in

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Commented [ABM6]: I think the phrase should be “rights OR obligations” not AND, but the prior rec uses AND. I will support either outcome.

<sup>16</sup> Parrillo, supra note 4, at 25.
<sup>17</sup> See Emerson & Levin, supra note 8, at 36–39.



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- 98 Recommendation 2. For example, an interpretive rule could require officials at one level  
99 of the agency hierarchy to follow the interpretive rule, with the caveat that officials at a  
100 higher level can authorize a modification, rescission, or waiver of that rule. Agency  
101 review should be available in cases in which frontline officials fail to follow such rules.
- 102 4. An agency should prominently state, in the text of an interpretive rule or elsewhere, that  
103 the rule expresses the agency's current interpretation of the law but that a member of the  
104 public will, upon proper request, be accorded a fair opportunity to seek reconsideration or  
105 revision of the rule.
- 106 5. An interpretive rule should not include mandatory language unless the agency is using  
107 that language to describe an existing statutory or regulatory requirement, or the language  
108 is addressed to agency employees and will not interfere with the fair opportunity called  
109 for in Recommendation 2.
- 110 6. An agency should make clear to members of the public which agency officials are  
111 required to follow an interpretive rule and where to go within the agency to seek  
112 modification, rescission, or waiver from the agency.
- 113 7. An agency should instruct all employees engaged in an activity to which an interpretive  
114 rule pertains that, although the interpretive rule may contain mandatory language, they  
115 should refrain from making any statements suggesting that an interpretive rule may not  
116 be contested within the agency to the extent provided in Recommendation 2. Insofar as  
117 any employee is directed, as an internal agency management matter, to act in conformity  
118 with an interpretive rule, that employee should be instructed as to the expectations set  
119 forth in Recommendations 2 and 3.
- 120 8. When an agency is contemplating adopting or modifying an interpretive rule, it should  
121 consider whether to solicit public participation, and, if so, what kind, before adopting or  
122 modifying the rule. Options for public participation include stakeholder meetings or  
123 webinars, advisory committee proceedings, and invitation for written input from the

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**Commented [ABM9]:** Omitted words not necessary.

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**Commented [ABM10]:** How does "elsewhere" fit into "the rule"? I think we discussed allowing an agency to have a general statement to this effect for all its interp rules: is that still alive and if so, we should make that clear by a sentence at the end of this Rec.

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127 public with or without a response. In deciding how to proceed, the agency should  
128 consider:

- 129 a. The agency’s own procedures for the adoption of interpretive rules.
- 130 b. The likely increase in useful information available to the agency from broadening  
131 participation, keeping in mind that non-regulated parties (regulatory beneficiaries  
132 and other interested parties) may offer different information than regulated parties  
133 and that non-regulated parties will often have no meaningful opportunity to  
134 provide input regarding interpretive rules other than at the time of adoption.

**Commented [ABM12]:** Parties can be seen as applying to adjudications, but we mean more than that. I would use “persons” here and in the next line also.

- 135 c. The likely increase in rule acceptance from broadening participation, **keeping in**  
136 **mind that non-regulated parties will often have no opportunity to provide input**  
137 **regarding interpretive rules other than at the time of adoption,** and that rule  
138 acceptance may be less likely if the agency is not responsive to stakeholder input.

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- 139 d. Whether the agency is likely to learn more useful information by having a specific  
140 agency proposal as a focal point for discussion, or instead having a more free-  
141 ranging and less formal discussion.

- 142 e. The practicability of broader forms of participation, including **invitation for**  
143 written input from the public, keeping in mind that broader participation may  
144 slow the adoption of interpretive rules and may diminish resources for other  
145 agency tasks, including the provision of interpretive rules on other matters.

**Commented [ABM14]:** Certainly no need for “invitation for”. Indeed, since this is part of 8 which means this & other tools, no need for any of including phrase.

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**Commented [ABM18]:** No need to repeat all of these.

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- 146 9. If an agency does not provide for public participation before adopting or modifying an  
147 interpretive rule, it should consider offering an opportunity for public participation after  
148 adoption or modification **of the kinds discussed in Recommendation 8.**

- 149 10. An agency may make decisions about the appropriate level of public participation  
150 **document-by-document** or by assigning certain procedures for public participation to  
151 general categories of documents. If an agency opts for the latter, it should consider

**Commented [ABM19]:** I think you mean rule by rule; there may be several documents that comprise a rule or many rules in a single document. Also other lines below use document.

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157 whether resource limitations may cause some documents, if subject to pre-adoption  
158 procedures for public participation, to remain in draft for substantial periods of time. If  
159 that is the case, agencies should either (a) make clear to stakeholders which draft  
160 interpretive rules, if any, should be understood to reflect current agency thinking; or (b)  
161 provide in each draft interpretive rule that, at a certain time after publication, the  
162 document will automatically either be adopted or withdrawn.

163 11. All written interpretive rules affecting the interests of regulated parties, regulatory  
164 beneficiaries, or other interested parties should be promptly made available electronically  
165 and indexed, in a manner in which they may readily be found. Written interpretive rules  
166 should also indicate the nature of the reliance that may be placed on them and the  
167 opportunities for reconsideration, modification, or waiver of them.

Commented [ABM20]: How does this last sentence fit in with Rec 4?

**Recommendations Applicable Only to Those Interpretive Rules Amenable to  
Alternative Approaches SEE EMAIL COMMENT ABOUT WHETHER ALL  
OF THIS IS NECESSARY OR CORRECT AS APPLIED TO INTERPRETIVE  
RULES.**

168 12. Some (policy statements) rules lay out several lawful options for the public but do not  
169 purport to be exhaustive, and others speak at a general level, leaving space for informal  
170 adjustments and negotiation between the agency and its stakeholders about how they  
171 should be applied. However, with respect to such rules, agencies should take additional  
172 steps, beyond those provided in Recommendations 1-11, to promote flexibility, as  
173 discussed below in Recommendations 13-15.

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174 13. Agencies should afford members of the public a fair opportunity to argue for lawful  
175 approaches other than those put forward by an interpretive rule, subject to any binding  
176 requirements imposed upon agency employees as an internal management manner. The  
177 agency should explain that a member of the public may take a lawful approach different  
178 from the one set forth in the interpretive rule or request that the agency take such a lawful  
179 approach. The interpretive rule should also include the identity and contact information



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187 of officials to whom such a request should be made. Additionally, with respect to such  
188 rules, agencies should take further measures to promote such flexibility as provided in  
189 Recommendation 14.

190 14. In order to provide a fair opportunity for other lawful approaches, an agency should,  
191 subject to considerations of practicability and resource limitations and the priorities  
192 described in Recommendation 15, consider additional measures, including the following:

- 193 a. Promoting the flexible use of interpretive rules in a manner that still takes due  
194 account of needs for consistency and predictability. In particular, when the agency  
195 accepts a proposal for a lawful approach other than that put forward in an  
196 interpretive rule and the approach seems likely to be applicable to other situations,  
197 the agency should disseminate its decision and the reasons for it to other persons  
198 who might make the argument, to other affected stakeholders, to officials likely to  
199 hear the argument, and to members of the public, subject to existing protections  
200 for confidential business or personal information.
- 201 b. Assigning the task of considering arguments for approaches other than that in an  
202 interpretive rule to a component of the agency that is likely to engage in open and  
203 productive dialogue with persons who make such arguments, such as a program  
204 office that is accustomed to dealing cooperatively with regulated parties and  
205 regulatory beneficiaries.
- 206 c. In cases where frontline officials are authorized to take an approach different from  
207 that in an interpretive rule but decline to do so, directing appeals of such a refusal  
208 to a higher-level official who is not the direct superior of those frontline officials.
- 209 d. Investing in training and monitoring of frontline personnel to ensure that they (i)  
210 treat parties' ideas for lawful approaches different from those in an interpretive  
211 rule in an open and welcoming manner; and (ii) understand that approaches other  
212 than that in an interpretive rule, if undertaken according to the proper internal



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- 213 agency procedures for approval and justification, are appropriate and will not  
214 have adverse employment consequences for them.
- 215 e. Facilitating opportunities for members of the public, including through  
216 intermediaries such as ombudspersons or associations, to propose or support  
217 approaches different from those in an interpretive rule and to provide feedback to  
218 the agency on whether its officials are giving reasonable consideration to such  
219 proposals.
- 220 15. Because measures to promote flexibility (including those listed in Recommendation 14)  
221 may take up agency resources, it will be necessary to set priorities for which interpretive  
222 rules are most in need of such measures. In deciding when to take such measures the  
223 agency should consider the following, bearing in mind that these considerations will not  
224 always point in the same direction:
- 225 a. An agency should assign a higher priority to an interpretive rule the greater the  
226 rule's impact is likely to be on the interests of regulated parties, regulatory  
227 beneficiaries, and other interested parties, either because regulated parties have  
228 strong incentives to comply with the rule or because the rule practically reduces  
229 the stringency of the regulatory scheme compared to the status quo.
- 230 b. An agency should assign a lower priority to promoting flexibility in the use of a  
231 rule insofar as the rule's value to the agency and to stakeholders lies primarily in  
232 the fact that it is helpful to have consistency independent of the rule's substantive  
233 content.